National Association of NAB BROADCASTERS

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May 11, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 07-57

Dear Ms. Dortch:

On May 10, 2007, James C. Miller III, on behalf of the National Association of Broadcasters, met with Commissioner Robert M. McDowell and Cristina Pauzé to discuss the above-captioned consolidated transfer applications of XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc.

Mr. Miller stated that the proposed merger would be contrary to the public interest under traditional antitrust analysis. He also disputed the merger parties' claims that XM and Sirius compete in a large market that includes iPods, CDs, and other audio products. Mr. Miller explained that such other products are not sufficiently substitutable for satellite radio service to prevent a merged XM/Sirius from raising its prices and earning monopoly returns for a sustained period.

The attached documents were distributed.

Respectfully submitted,

Lawrence A. Walke

Attachments

cc: The Honorable Robert M. McDowell
Cristina Chou Pauzé

James C. Miller III

32 Pophams Ford Road Sperryville, Virginia 22740 PHN: 540-987-8920 FAX: 540-987-8930

April 13, 2007

The Honorable Mitch McConnell
United States Senate
361-A Russell Senate Office Building
Washington, DC 20510

Dear Senator McConnell:

The National Association of Broadcasters asked me to assess the effects on competition and consumers of the recently announced "merger of equals" between the two satellite radio providers, XM and Sirius. As a former chairman of the Federal Trade Commission (1981-1985), it is my opinion that a merger between these two entities would be contrary to the public interest.

This is a two-down-to-one merger. There are no other providers in the market. Under traditional antitrust analysis, there are two principal defenses in such a case. The first is the "failing firm doctrine," which holds that when it is inevitable that only one firm can survive the antitrust authorities gain little by blocking the merger. Yet, Mr. Karmazin stressed in his briefings and in sworn testimony before the Antitrust Task Force of the House Judiciary Committee that Sirius is a viable company even without the merger. Mr. Parsons has said the same about XM.

The second principal defense is that entry into the market is so free that should this merged firm perform poorly from consumers' standpoint, new firms would enter. But this is a very complicated business, involving very sophisticated technology and the use of techniques over which many already have (intellectual) property rights. It is also a very capital-intensive industry, involving the launch of working satellites and an on-the-ground distribution network. In fact, the losses the two companies have run can be traced primarily to their having made sizable capital investments that only now are beginning to pay off.

The new defense that has emerged is Mr. Karmazin's assertion that XM and Sirius are part of a much larger market – it isn't just satellite radio, it's broadcast radio, i-Pods, CDs, and so forth – and the merger is not two-down-to-one, but a merger of small players in a large market. This is an empirical question, of course. No doubt there is *some* substitutability among these products. But to meet the test of not harming consumers, there has to be such substitutability that the merged firm could not raise its prices and earn monopoly returns for a sustained period. It is common sense that to many consumers the alternatives are not an adequate substitute, and as described above, entry into this market would be very, very difficult.

Whatever way you look at it, the merged firm would have an ability to raise prices to consumers and/or cut costs and quality by limiting the number and variety of offerings and slowing, if not reversing, the rate of technological advance.

Accordingly, I conclude that the merger of XM and Sirius would be contrary to the public interest.

Sincerely yours,

James C. Miller III

The Washington Times

Satellite radio merger: How Sirius?

By James C. Miller III
May 1, 2007

In 1997, the Federal Communications Commission established protocols enabling two, competing satellite radio companies to develop. Now, the emerging entities, XM and Sirius, want to merge and are making bold claims about the benefits to their listeners. Since this is a communications matter, the companies must obtain approval of the FCC as well as the federal antitrust authorities, the Justice Department in this case. Does a merger here make sense, even though this would be a two-down-to-one combination?

About a year ago, I was retained to consult with a manufacturer of generic-brand oral rinse (mouthwash) which had proposed to merge with its only major competitor. Since under a narrow interpretation of the relevant market this was a two-down-to-one merger, the Federal Trade Commission had quite properly issued a "second request," tolling the merger while it examined the likely effects on consumers. My counsel to the firm was to go along, give the FTC the information it requested but supply reasons why the combination would have no adverse consumer impact. Aside from the fact the merged company would have to compete with several national brands, entry into the oral rinse market is very easy: You need a bottling machine, a little alcohol, a little flavoring, a little coloring, a lot of water, a modest sales force, and a physical distribution network. Free entry would police the market even if the national brands did not. "This ain't rocket science," I was fond of saying. After review, the FTC approved the deal.

But satellite radio is rocket science. You have to launch the "birds" -- very expensive. You must possess the right broadcast and processing technologies, some of which are under patent protection. You must have a sophisticated distribution system to sell your services, as well as agreements with the suppliers of all the programs you wish to carry. The threat of entry is unlikely to do any policing in this market.

The policing question might be trumped if one of the companies were going out of business. But this is not the case. Sirius CEO Mel Karmazin recently told a House subcommittee: "We're not making a failing company argument, and we're not saying that if, in fact, our merger were not approved at the end of the day, we would not continue to go along and do business."XM Chairman Gary Parsons reported, "The failing companies' doctrine is not part of our fling. We don't have to do this merger."

So how do they assure consumers they won't be injured? They say that if the merger is approved they will do two things. First, they will expand their offerings -- each subscriber will get more programming than at present. Second, they will keep their prices where they are. But when pressed, neither company is prepared to promise subscribers of the merged firm will receive all the programming they now receive from their current vendor plus all the programming offered by the competitive vendor. (Howard Stern plus Oprah, for example?)

The promise with respect to price is also murky. Is it per subscriber? Per channel subscribed? Is it nominal or adjusted for inflation? Unanswered questions -- and then, too, how would such promises be enforced?

Is there anything else, you ask? Yes. According to Mr. Karmazin, the relevant market isn't just satellite radio, it's over-the-air broadcasts, CD players, even iPods and other MP3s. This, of course, is an empirical question. But does it make sense that for most satellite radio subscribers these are interchangeable?

The FCC itself, in setting up the satellite system and insisting on competition, said, "Other audio delivery media are not, of course, perfect substitutes for satellite [radio]." By conventional Herfindahl index (HHI) measures, which the antitrust authorities rely upon to gauge such things, the increases in concentration, market by market, are quite beyond the Justice Department's merger guidelines -- which view post-merger HHIs above 1,800 with great suspicion. Even the largest radio markets have HHIs above that threshold, and smaller markets have HHIs twice as high.

But just on the face of it, would the threat of switching to broadcast radio or listening to an iPod really restrain the merged company from raising its prices? Would that keep it from cutting costs by reducing offerings? Would that keep the company on the edge of technological developments, leading to better, even more reliable service?

It stretches credulity to believe that a two-down-to-one merger in a market with no really good substitutes and where entry is very, very difficult would be in the public interest. Surely the federal agencies know that too.

James C. Miller III is former chairman of the Federal Trade Commission (1981-1985) and is a consultant to the National Association of Broadcasters.

(Letter to Wall Street Journal)

James C. Miller III

32 Pophams Ford Road Sperryville, Virginia 22740 PHN: 540-987-8920 FAX: 540-987-8930

April 30, 2007

Dear Editor:

Your editorial defending the proposed Sirius-XM merger (April 21-22) is an ad hominem attack on the National Association of Broadcasters, not a serious defense of the deal. In a debate, what matters is not the identity of the participants but the merits of their arguments. Holman Jenkins' op-ed, "Beyond Parody" (April 25), is more on point, and warns about inappropriate, overzealous application of antitrust, but it too fails to address the real problems with Sirius-XM.

For good reason, antitrust constraints are appropriate where a merger would eliminate competition for a considerable period. Unlike Office Depot and Staples (cited by Jenkins), entry into satellite radio is very, very difficult. Not only would a new firm have to launch satellites, it would have to acquire the requisite technology, obtain rights to retransmit programming, employ a system of distribution, get customers to purchase compatible receivers, *and obtain permission from the Federal Communications Commission* – itself a lengthy process.

The extent to which i-Pods, CDs, cassettes, DVDs, and over-the-air broadcasts are sufficiently close substitutes to police the satellite radio market is an empirical question that the Department of Justice and the FCC will evaluate. But simply postulating the possibility is not the same as providing evidence.

Neither Sirius nor XM have claimed the failing firm defense, for good reason. Both have suffered losses due to initial investments in infrastructure, but are now poised to recoup much more.

Knee-jerk application of antitrust constraints is highly destructive. Knee-jerk dismissal of antitrust principles is not much better.

Sincerely yours,

/s/

James C. Miller III

The author is a former chairman of the Federal Trade Commission (1981-1985) and a consultant to the NAB.